

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
vs.  
  
ROBERTO SOTELO (5),  
  
Defendant.

CASE NO. 13cr4514-BEN

ORDER DENYING  
MOTION TO SUPPRESS  
[Dkt. No. 181]

Now before the Court is Defendant's motion to suppress all wire and electronic surveillance evidence (filed December 2, 2014). Defendant's motion to suppress is denied.

**BACKGROUND**

According to the Government, in the spring of 2012, a law enforcement task force began investigating a conspiracy to distribute methamphetamine and collect "tax" money from drug dealers that operated with associates both inside and outside state and local detention and prison custodial facilities. As a result of the investigation, approximately 70 individuals have been charged. During the investigation, a number of wiretap orders were applied for and issued by judges in this and other United States District Courts.

Defendant now seeks to suppress evidence of telephone conversations

1 between himself and others discussing the smuggling of drugs into Donovan State  
2 Prison and collecting “taxes” for the sale and distribution of those drugs inside the  
3 prison. According to the Indictment, Defendant was an inmate in a California state  
4 prison. According to the motion, the fifth, sixth, seventh, eighth, and ninth wiretaps  
5 purport to have intercepted Defendant’s communications. All nine wiretap orders in  
6 this district were issued by United States District Judges Hon. Irma E. Gonzalez and  
7 Thomas J. Whelan. Defendant does not identify a particular interception for which  
8 he seeks suppression. Defendant asserts that each wiretap order was based on a  
9 Title III wiretap application lacking the required showing of necessity. The  
10 Government does not contest Defendant’s *standing* to challenge the admissibility of  
11 wiretap evidence.

12  
13 **I. THE FOURTH AMENDMENT DOES NOT PROTECT CELLULAR**  
14 **TELEPHONE COMMUNICATIONS BY A PRISONER**

15 Defendant does not argue a Fourth Amendment right to suppression of his  
16 telephone conversations. Nevertheless, it is important to note that in most cases the  
17 Fourth Amendment protects the rights of the people “to be secure in their persons,  
18 houses, papers, and effects, against unreasonable searches and seizures.” U.S.  
19 Const. amend. IV. Its protection extends to telephone conversations and requires  
20 the government to obtain a warrant before electronically eavesdropping.

21 However, the protection applies only if a person has a reasonable expectation  
22 of privacy in not having his words or conversation overheard. *See Katz v. United*  
23 *States*, 389 U.S. 347 (1967). No court has ruled that a prison inmate has a  
24 reasonable expectation of privacy for communications he makes by cellular  
25 telephone. Defendant cites no case. Indeed, the United States Supreme Court  
26 decided that the Fourth Amendment proscription against unreasonable searches  
27 does not apply to a person within the walls of the prison cell. *See Hudson v.*  
28 *Palmer*, 468 U.S. 517, 525-26 (1984) (“[W]e hold that society is not prepared to  
recognize as legitimate any subjective expectation of privacy that a prisoner might

1 have in his prison cell and that, accordingly, the Fourth Amendment proscription  
 2 against unreasonable searches does not apply within the confines of the prison cell.  
 3 The recognition of privacy rights for prisoners in their individual cells simply  
 4 cannot be reconciled with the concept of incarceration and the needs and objectives  
 5 of penal institutions.”).

6 Under *Palmer*, Defendant has no Fourth Amendment right to privacy while  
 7 incarcerated upon which to base a motion to suppress evidence.

8  
 9 **II. A COMMUNICATION THROUGH USE OF A CONTRABAND CELL**  
 10 **PHONE BY A PRISONER IS NOT COVERED BY 18 U.S.C. § 2518**  
 11 **(“TITLE III”)**

12 Defendant argues that the wiretap application supporting each wiretap order,  
 13 which led to the interception of his cellular telephone communications, did not  
 14 satisfy Title III. *See* Title III of the Omnibus Crime Control and Safe Streets Act of  
 15 1968, 18 U.S.C. §§ 2510 *et seq.* (“The Wiretap Act” or “Title III”). As a general  
 16 matter, Title III prohibits electronic surveillance by the federal government except  
 17 under defined circumstances. The Act also provides for suppression of evidence in  
 18 three instances enumerated in 18 U.S.C. § 2518(10)(a). Defendant implicitly relies  
 19 on that section to suppress.

20 Whether Title III applies to cellular telephone communications by or between  
 21 prison inmates is a question of first impression. Title III was enacted in 1968,  
 22 before the invention of the cellular telephone. It was enacted to protect the Fourth  
 23 Amendment right to privacy for a telephone conversations (as recognized in *Katz v.*  
 24 *United States*, 389 U.S. 347 (1967)). *See Gelbard v. United States*, 408 U.S. 41, 47  
 25 (1972) (legislative history is clear that Congress was concerned about  
 26 “safeguard[ing] the privacy of innocent persons.”); *see also United States v.*  
 27 *Forrester*, 616 F.3d 929, 945 (9th Cir. 2010) (“Supreme Court has routinely  
 28 acknowledged that § 2518 . . . was enacted specifically to meet the constitutional  
 requirements for electronic surveillance enunciated by the Supreme Court in *Berger*

1 [v. *New York*] and *Katz v. United States*.”). While there have been more recent  
2 amendments, Title III still does not specifically mention cellular telephones.

3 The Ninth Circuit has acknowledged that a conventional wiretap order may  
4 apply to a cellular telephone in ordinary circumstances, and that a “roving wiretap”  
5 order is not required for a cell phone even though a cell phone has no fixed location.  
6 *See United States v. Oliva*, 705 F.3d 390, 400-01 & n.4 (9th Cir. 2012) (“As noted  
7 earlier, under Title III, the district court may authorize a standard intercept of  
8 communications over a land line or cellular telephone only if the government’s  
9 application includes ‘a particular description of the nature and location of the  
10 facilities from which or the place where the communication is to be intercepted.’ §  
11 2518(1)(b)(ii).”); *see also United States v. Goodwin*, 141 F.3d 394, 403 (2nd Cir.  
12 1997) (assuming that Title III applies to cellular telephones and deciding that for a  
13 cellular telephone, the Government did not need to obtain a “roving wiretap.”). But  
14 no court has addressed the applicability of Title III to a cellular telephone being  
15 used by a prisoner.

16 And no court has considered the impact of Congressional action in 2010  
17 defining a mobile phone to be contraband for federal prisoners. *See Cell Phone*  
18 *Contraband Act of 2010*, P. L. 111-225 [S 1749], August 10, 2010 (amending 18  
19 U.S.C. § 1791); *see also* Statement by Senator Feinstein, 155 Cong. Rec. S10112-  
20 01, 2009 WL 3171677 (“This bill would close this loophole by defining cell phones  
21 as contraband material under Federal law. As a result, any person smuggling or in  
22 possession of a cell phone could potentially serve up to a year in prison. A cell  
23 phone should never be in the hands of a prisoner. The presence of these cell phones  
24 poses a grave safety concern for staff, inmates, and the public. We know that  
25 inmates use these phones to conduct criminal business outside of prison walls,  
26 including directing gang hits, controlling drug trafficking operations and even  
27 conducting credit card fraud.”).

28 Since the 2010 amendment to 18 U.S.C. § 1791, it has been unlawful for a

1 prisoner in a federal prison to possess or use a cell phone. *See* § 1791(d)(1)(F)  
2 defining a prohibited object as “a phone or other device used by a user of  
3 commercial mobile service. . . .” A Westlaw search found only two unpublished  
4 cases involving violations of the Cell Phone Contraband Act. *See United States v.*  
5 *Drakes*, \_\_Fed. App’x. \_\_, 2014 WL 6676994 (11th Cir. Nov. 26, 2014) (reviewing  
6 sentence of former federal prison guard convicted of smuggling seven cell phones  
7 into prison for resale to inmates.); *United States v. Gadsden*, Case No 09-305, slip  
8 op., 2012 WL 4973412 (W.D. Pa. Oct. 17, 2012) (pretrial order denying severance  
9 of counts with one count alleging possession of a prohibited object (a cellular  
10 telephone) in violation of § 1791(b)(4)). Neither case considered whether the  
11 Wiretap Act applied to conversations by inmates using contraband cellular  
12 telephones.

13 This Court finds that Congress created an implicit exception to the  
14 requirements of Title III. Title III does not apply to the interception by law  
15 enforcement officers of a telephone communication from a prisoner using a  
16 contraband cellular telephone. *Cf. Mitchum v. Foster*, 407 U.S. 225, 235 (1972)  
17 (describing numerous implied exceptions to the anti-injunction statute (28 U.S.C.  
18 § 2283)); *Feres v. United States*, 340 U.S. 135 (1950) (finding an implied exception  
19 to the Federal Tort Claims Act for injuries to servicemen where the injuries are  
20 incident to service); *McMellon v. United States*, 387 F.3d 329, 349 (4th Cir. 2004)  
21 (holding recent Suits in Admiralty Act (46 U.S.C. App. §§741-52) must be read to  
22 include an implied discretionary function exception to its waiver of sovereign  
23 immunity, as in the older Federal Tort Claims Act).

24 Passage of the Cell Phone Contraband Act makes clear that Congress  
25 considered it dangerous for an inmate to possess a cellular telephone. The potential  
26 for criminality is large. In this case, the allegations of the indictment (if true) aptly  
27 illustrate some of the dangers: orchestrating assaults on other inmates, planning  
28 contraband drug sales within the prison, ordering the transfer of drug proceeds in

1 outside accounts, surveillance of other inmates, carrying out a criminal conspiracy,  
 2 and doing all of the above while avoiding detection by prison guards. And the use  
 3 of smuggled cellular telephones by prison inmates has become a large national  
 4 problem.

5 In federal institutions and prison camps, GAO  
 6 reports that the number of cell phones confiscated by the  
 7 Federal Bureau of Prisons (BOP) grew from 1,774 in 2008  
 8 to 3,684 in 2010. While not all states track or report data  
 9 on the use of contraband wireless devices, the data that has  
 10 been reported demonstrates significant growth. For  
 11 example, California correctional officers seized  
 12 approximately 261 cell phones in 2006; by 2011,  
 13 correctional officers discovered more than 15,000  
 14 contraband wireless devices. Further, a test of an  
 interdiction technology in two California State prisons  
 detected more than 25,000 unauthorized communication  
 attempts over an 11 day period in 2011. A similar  
 interdiction system permanently installed in a Mississippi  
 correctional facility reportedly blocked 325,000  
 communications attempts in the first month of operation,  
 and as of February 2012, had blocked more than 2 million  
 communications attempts.

15 *Promoting Technological Solutions to Combat Contraband Wireless Device Use in*  
 16 *Corr. Facilities*, F.C.C. Notice of Proposed Rulemaking, 28 F.C.C. Rcd. 6603, 6607  
 17 2013 WL 1855953 \*3 (2013); *see also* E. Fitzgerald, *CELL "BLOCK" SILENCE:*  
 18 *WHY CONTRABAND CELLULAR TELEPHONE USE IN PRISONS WARRANTS*  
 19 *FEDERAL LEGISLATION TO ALLOW JAMMING TECHNOLOGY*, 2010 Wis. L.  
 20 Rev. 1269, 1276-77 (citations omitted).<sup>1</sup>

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21 <sup>1</sup> Fitzgerald writes:

22 Cell phone smuggling is difficult to prevent because the devices are  
 23 brought into correctional facilities in a myriad of ways. Inmates  
 24 coordinate smuggling efforts with corrupt correctional facility workers,  
 25 visiting family members, or fellow gang members. Smugglers often throw  
 26 handsets over facility walls or conceal them in packages sent to the  
 27 prisons. One facility in Texas reported finding seventy-five cell phones  
 28 hidden in an air compressor. Smugglers opened the metal tank, hid the  
 phones and chargers with some narcotics, and then welded the tank shut.  
 Officials found the phones when drug-sniffing dogs detected the  
 narcotics. The San Francisco Chronicle reported that "more than half the  
 phones in prisons come from staff at the facilities - including guards,  
 cooks, [and] health care workers." Correctional facility staff is familiar  
 with the facilities in which they work, and, in some cases, undergo less



1 It would be an ironic interpretation of the law to find that a prison inmate,  
 2 who by virtue of his initial crime and conviction, when he is placed in a cellblock  
 3 where he has *no* Fourth Amendment rights, and when he commits a further crime by  
 4 obtaining and using a contraband cellular telephone, acquires a statutory right under  
 5 Title III to be free from law enforcement eavesdropping, unless a Title III wiretap  
 6 order is first obtained. Yet, this is the implicit argument. Defendant argues that,  
 7 even if he does not hold a constitutional right to privacy for his contraband  
 8 telephone communications, he enjoys a statutory right to suppression under Title III.  
 9 His implicit argument maintains that he has a statutory right to illicitly use a  
 10 contraband cellular phone to communicate with others about a criminal conspiracy,  
 11 and he enjoys protection from those communications being recorded and admitted  
 12 against him in court, unless a valid wiretap order was in place.<sup>2</sup> This cannot be  
 13 what Congress intended.

14 It must be the case that Congress intended to except from the purview of Title  
 15 III's law enforcement restrictions, the interception of contraband cellular telephone  
 16 communications from or to an inmate within a jail or prison. Therefore, because  
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18 stringent security requirements than visitors. In 2009, 300 California  
 19 correctional employees were disciplined for suspected cell phone  
 20 smuggling. 150 more have been disciplined in 2010. One California  
 21 correctional officer told officials that he made more than \$100,000 in one  
 22 year by smuggling cell phones. Since 2007, 230 Texas correctional  
 23 facility employees have been disciplined for "cell phone-related  
 24 infractions." Family members are also often culprits. Richard Tabler's  
 25 mother and sister allegedly assisted him in procuring the cellular phone  
 26 he used to call Senator Whitmire. They were later indicted on charges of  
 assisting an inmate to obtain a contraband cell phone. The cost to procure  
 a cell phone on the black market varies widely depending on prison  
 location and an inmate's level of security, but is within reach for criminals  
 continuing to engage in profitable criminal enterprises. On the high end,  
 Texas death row inmate Tabler paid \$2100 for his contraband cell phone.  
 California officials note that contraband cell phones can be purchased for  
 between \$100 and \$400 each. Family or gang members often cover the  
 initial financial outlay and subscription rates.

27 <sup>2</sup>It makes no difference that Defendant was an inmate in a California state or  
 28 local facility, rather than a federal prison, because California law also treats possession  
 and use of a cellular phone by an inmate as a misdemeanor crime. *See* Cal. Penal Code  
 §§ 4575 & 4576.

1 Title III implicitly excepts law enforcement officers from the need to obtain a  
 2 wiretap order before intercepting or recording an inmate's contraband cell phone  
 3 communications, Defendant's motion to suppress such recordings under Title III is  
 4 denied.

5  
 6 **III. ALTERNATIVELY, THE DECISION OF THE DISTRICT JUDGE**  
 7 **ISSUING A WIRETAP ORDER IS ENTITLED TO DEFERENCE**  
 8 **FROM ANOTHER DISTRICT JUDGE CONSIDERING A MOTION**  
 9 **TO SUPPRESS**

10 When a United States District Judge reviews a Title III wiretap application  
 11 and concludes that law enforcement has made a proper case and issues a wiretap  
 12 order, that decision is accorded a measure of deference by the court of appeals.  
 13 *United States v. Rivera*, 527 F.3d 891, 904 (9th Cir. 2008) (“[W]e may not reverse  
 14 simply because we might have decided not to grant the wiretap. We review the  
 15 issuing court's decision to grant the wiretap for an abuse of discretion.”); *United*  
 16 *States v. Lynch*, 437 F.3d 902, 912 (9th Cir. 2006) (en banc) (“[T]he conclusion that  
 17 the wiretap was necessary in each situation is reviewed for abuse of discretion.”);  
 18 *United States v. Canales Gomez*, 358 F.3d 1221, 1225 (9th Cir. 2004) (“The issuing  
 19 judge's decision that the wiretap was necessary is reviewed under an abuse of  
 20 discretion standard.”). The correct standard of review for a district court to use  
 21 when judging a motion to suppress, however, has not been identified by the parties  
 22 and the Ninth Circuit has not directly addressed the question.

23 Some district courts have implicitly reviewed wiretap orders *de novo*. Other  
 24 district courts have applied an abuse of discretion standard. *See United States v.*  
 25 *Yim*, No. CR11-131-MJP, 2012 WL 395791 \*5 (W.D. Wash. Feb 7, 2012) (citations  
 26 omitted) (“Defendants argue that the Court should apply a *de novo* review to the  
 27 showing of necessity. Defendants cite no case that stands for that proposition, but  
 28 urge the Court to do so because this is the first time the allegations as to necessity  
 are subjected to an adversarial challenge. The Court is not persuaded by this



1 argument, given the fact this Court sits in the same position as the Ninth Circuit  
2 when reviewing an affidavit's showing of necessity. Both before this Court and the  
3 Ninth Circuit, the warrant has issued, the arrests have been made, and the  
4 adversarial process commenced. Prior to that, it is up to the reviewing judge to use  
5 her discretion to gauge whether the affidavit sustains a showing of necessity and  
6 that determination is entitled to deference under an abuse of discretion standard.  
7 The Court thus applies the abuse of discretion standard in analyzing the issue of  
8 necessity.”); *United States v. Velarde-Ozuna*, No. CR10-754-TUC-CKJ, 2011  
9 WL5007918 \*2 (D. Ariz. Oct. 20, 2011) (“An appellate court reviews an ‘issuing  
10 judge’s decision that the wiretaps were necessary for an abuse of discretion.’ A  
11 district court evaluating a wiretap authorization in order to resolve a suppression  
12 motion applies the same standard of review.”); *United States v. Ai Le*, 255 F. Supp.  
13 2d 1132, 1134 (E.D. Cal. 2003) (citations omitted) (“[A] court reviewing a wiretap  
14 authorization must use an abuse of discretion standard.”). These decisions are  
15 better reasoned and persuasive. Consequently, this Court will not suppress wiretap  
16 evidence simply because it might have adjudged the wiretap application differently  
17 than did an issuing judge. The decision to issue a wiretap order will be accorded a  
18 measure of deference. Only if there is a clear and convincing case made that the  
19 wiretap order was the result of the issuing judge’s abuse of discretion, will this  
20 Court grant a motion to suppress.

21 Defendant makes no argument that the judge who issued the wiretap order in  
22 this case in any way abused her discretion. She had the lengthy wiretap application  
23 and the application arguably supported the order. She could arguably find probable  
24 cause to believe a crime was being committed. She could arguably find that other  
25 investigative tools had been tried and a wiretap was necessary to extirpate the  
26 criminal conspiracy. She could arguably find that the wiretap request was  
27 sufficiently confined. In short, Defendant has identified no reason, and this Court  
28 finds there is no reason, to conclude that the issuing judge’s decision is not entitled

1 to deference. Defendant's argument now, that the wiretap order should not have  
2 been issued because the application was deficient, without much more, is  
3 foreclosed. Therefore, the motion to suppress is denied.

4  
5 **IV. ALTERNATIVELY, THE GOVERNMENT MADE A SUFFICIENT**  
6 **SHOWING OF NECESSITY IN THE WIRETAP APPLICATION**

7 Assuming for the sake of argument, that Defendant, using a contraband cell  
8 phone while incarcerated, has a constitutional or statutory right to suppress evidence  
9 gained in violation of Title III, and assuming for the sake of argument that no  
10 deference is to be given the decision of the wiretap-issuing district judge, Defendant  
11 has still failed to carry his burden of proving a wiretap order was defective.

12 The Wiretap Act provides three grounds upon which evidence derived from a  
13 wiretap may be suppressed. First, it may be proven that, "the communication was  
14 unlawfully intercepted." *See* 18 U.S.C. 2518(10)(a)(i). Second, it may be proven  
15 that, "the order or authorization or approval under which it was intercepted is  
16 insufficient on its face." *See* 18 U.S.C. 2518(10)(a)(ii). Third, it may be proven  
17 that, "the interception was not made in conformity with the order of authorization or  
18 approval." *See* 18 U.S.C. 2518(10)(a)(iii). Defendant has not specified the basis  
19 upon which he seeks suppression.

20 When a court is reviewing "necessity," the Ninth Circuit has adopted a  
21 "common sense approach to evaluate the reasonableness of the government's good  
22 faith efforts to use traditional investigative tactics or its decision to forego such  
23 tactics based on the unlikelihood of their success or the probable risk of danger  
24 involved with their use." *United States v. Garcia-Villalba*, 585 F.3d 1223, 1228  
25 (9th Cir. 2009) (citations and internal quotations omitted). When investigating a  
26 criminal conspiracy, the government is given "more leeway in its investigative  
27 methods.." *Id.* at 1230. "Like the Hydra of Greek Mythology . . . the conspiracy  
28 may survive the destruction of its parts unless the conspiracy is completely

1 destroyed.” *Id.* (quoting *United States v. McGuire*, 307 F.3d 1192, 1197-98 (9th  
2 Cir. 2002). This is because, the Ninth Circuit has observed, “it is one of the first  
3 duties of every government to extirpate gangs of thieves.” *Id.*

4 **A. Omissions in the Affidavit**

5 Defendant argues that the agent’s affidavit supporting the application for a  
6 wiretap “does not detail each and every fact learned during the course of the  
7 investigation.” He suggests that the agent may have left out facts, but does not  
8 identify any specific omitted facts. A Defendant seeking suppression on the basis of  
9 a misstatement or omission must satisfy several requirements, including a detailed  
10 offer of proof and an affidavit, before going forward under *Franks v. Delaware*, 43  
11 U.S. 154, 155-56 (1978). *United States v. Perdomo*, 800 F.2d 916, 920 (9th Cir.  
12 1986) (listing five requirements for a *Franks* hearing); *United States v. Gutierrez*,  
13 No. 12CR236-IEG, 2012 WL 6624769\*1-4 (S.D. Cal. Dec. 19, 2012) (describing  
14 requirements for *Franks* hearing for wiretaps). Defendant has not satisfied these  
15 requirements.

16 **B. Broad Goals of the Investigation**

17 Defendant argues that the government’s stated goal of the investigation was  
18 overly broad to the point of being flawed. However, the Ninth Circuit has approved  
19 in other cases similarly broad investigative goals in drug smuggling conspiracies.  
20 *See Canales Gomez*, 358 F.3d at 1224; *United States v. Shryock*, 342 F.3d 948, 975-  
21 76 (9th Cir. 2003); *see also United States v. Chan*, No. C 05-375 SI, 2006 WL  
22 1581946\*6 (N.D. Cal. June 6, 2006) (denying motion to suppress wiretap evidence  
23 where investigatory goals of identifying conspirators and methods were very  
24 broad.). He notes that the Government may not adopt investigatory goals “so far  
25 and so wide” that the goals can be seen as “manufactur[ing] necessity in all  
26 circumstances.” *United States v. Blackmon*, 273 F.3d 1204, 1211 (9th Cir. 2000).  
27 In *Blackmon*, the principal problem was that the Title III application contained  
28 material omissions and misstatements. When “purged of these misstatements . . .

1 the remainder of the application, which contain[ed] generalized statements that  
2 would be true of any narcotics investigation, fail[ed] to contain sufficiently specific  
3 facts to satisfy the requirements of § 2518(1)(c).” *Id.* In this case, the Government  
4 did not cast its net so far and so wide as to have manufactured necessity in every  
5 circumstance. Instead, it adopted an investigatory goal that was limited to a  
6 narcotics distribution and taxation conspiracy operated in California Prisons and  
7 jails. The applications in this case do not have the same flaws as the *Blackmon*  
8 application.

9 **C. Alternative and Less Intrusive Techniques**

10 Defendant’s main thrust is that there were less intrusive investigative  
11 techniques that could have been tried as an alternative to wiretaps. For example,  
12 Defendant discusses recorded jail calls, confidential informants, surveillance,  
13 tracking devices, grand jury subpoenas, searches, mail covers, undercover agents,  
14 and pen registers.

15 But the Government need not exhaust every possible means of investigation  
16 before seeking a wiretap authorization. The Ninth Circuit has said that a wiretap  
17 should not ordinarily be the first step in an investigation, “but that law enforcement  
18 officials need not exhaust every conceivable alternative before obtaining a wiretap.”  
19 *United States v. McGuire*, 307 F.3d 1192, 1196-97 (9th Cir. 2002). Here, the  
20 Government used a variety of traditional investigatory techniques before seeking  
21 wiretaps. It was not obligated to use that which Defendant, now, suggests would  
22 have been effective. This argument is not enough.

23 **D. Confidential Informants**

24 Defendant argues that the investigators had used confidential informants  
25 successfully. He criticizes the government for not waiting for new informants to  
26 appear and suggests that the government should have tried inserting a undercover  
27 agent before resorting to a wiretap.

28 The Ninth Circuit has explained that “the use of informants to investigate and

1 prosecute persons engaged in clandestine criminal activity is fraught with peril.”  
2 *Canales Gomez*, 358 F.3d at 1226 (quoting *United States v. Bernal-Obeso*, 989 F.2d  
3 331, 333 (9<sup>th</sup> Cir. 1993)). Informants are often untrustworthy and unattractive to a  
4 jury. “There is not a trial lawyer alive who does not understand that juries are wary  
5 of any witness receiving a benefit for testifying.” *Id.* at 1227. In this case, the  
6 confidential informant committed another serious crime during the time when the  
7 government was investigating its case against this defendant. The informant’s  
8 unrestrained and unsanctioned criminal activity gave the investigators good reason  
9 to discontinue the employment of the informant. “The truth-seeking function of our  
10 courts is greatly enhanced when the evidence used is not tainted by its immediate  
11 informant source and has been cleansed of the baggage that always comes with  
12 them.” *Id.* In contrast to the testimony of informants, “wiretap evidence out of the  
13 mouths of defendants is valuable corroboration of informant testimony . . . [and]  
14 serves to ensure that what investigators are being told by informants is accurate, a  
15 very valuable function that guards the indictment of the innocent.” *Id.* In light of  
16 these investigatory concerns, the Ninth Circuit has said, “a reasoned review of a  
17 wiretap request must take into account the added difficulty, expense, and danger of  
18 using informants, especially those concurrently charged with other crimes.” *Id.*  
19 The government, in this case, has made a sufficient showing of necessity.

#### 20 **E. Pre-Wiretap Investigation Success**

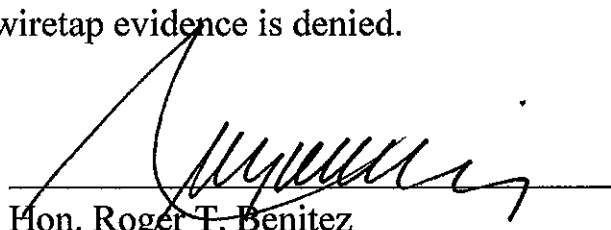
21 Defendant argues that investigators had achieved every reasonable goal of  
22 their investigation prior to seeking the wiretaps, and that therefore, the wiretaps  
23 were not necessary. A similar argument was dismissed by the Ninth Circuit. Even  
24 if an investigation has been successful enough to gain an indictment against one  
25 conspirator, “it is plain beyond doubt that the existence of an indictment does not  
26 make wiretapping unnecessary.” *Id.* at 1198. A wiretap may be necessary so that  
27 the Government may develop “evidence of guilt beyond a reasonable doubt, not  
28 merely evidence sufficient to secure an indictment.” *Id.* Finally, possession of

1 evidence against some conspirators, does not bar the Government from seeking  
2 wiretap evidence against others. *Id.* at 1199. This argument is not enough.

3 **V. CONCLUSION**

4 Defendant's motion to suppress wiretap evidence is denied.

5 DATED: 2/2/15

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8 Hon. Roger T. Benitez  
9 United States District Judge  
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